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ABSTRACT

This document contains edited presentations given during a conference on teacher negotiations and solutions to impasse in Rhode Island. The principal speakers were Henry J. Nardone, chairman of the Elementary and Secondary Education Sub-Committee of the Board of Regents; Julius C. Michaelson, Attorney General for Rhode Island; and Dr. Peter Feuille, Assistant Professor of Organization and Human Resources at the State University of New York at Buffalo. Nardone discussed the Regents' ideas on impasse resolution, Michaelson discussed the current state legislation concerning teacher strikes and argued for the advantages of binding arbitration over strikes, and Dr. Feuille discussed a number of negotiation impasse resolution alternatives that are in use outside of Rhode Island. (IRT)

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TEACHER NEGOTIATIONS AND SOLUTIONS TO IMPASSE

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PRESENTATIONS

AT A CONFERENCE SPONSORED BY THE DEPARTMENT OF ADMINISTRATION AND CURRICULUM AND THE DIVISION OF EDUCATIONAL STUDIES AT RHODE ISLAND COLLEGE ON DECEMBER 6, 1975

CRIST H. COSTA
ELEANOR M. McMAHON
THOMAS C. SCHMIDT
HENRY J. NARDONE
JULIUS C. MICHAELSON
PETER FEUILLE

edited by
Sidney P. Rollins

EA 007 974

RHODE ISLAND COLLEGE

TEACHER NEGOTIATIONS

AND SOLUTIONS

TO IMPASSE

PRESENTATIONS

A Conference
Sponsored by the
Department of Administration and Curriculum
and the
Division of Educational Studies

Rhode Island College
December 6, 1975

FOREWORD

The edited presentations that appear in this publication are concerned with teacher negotiations and solutions to impasse. When a conference was planned for December 6, 1975, even the most enthusiastic and optimistic among us did not believe that our speakers would agree on a single best approach to teacher negotiations and solutions to impasse. We were right. In this publication you will find a variety of recommendations relating to teacher negotiations. But apparently there is no one best recommendation on which all agree.

The purpose of this conference was, in Dean Eleanor McMahon's words, to provide a forum for "discussion and elucidation." As you read the presentations you will find that this purpose was achieved.

A few words about the presentors--DR. CRIST H. COSTA is Chairman of the Department of Administration and Curriculum at Rhode Island College; DR. ELEANOR M. McMAHON is Dean of Educational Studies at Rhode Island College; DR. THOMAS C. SCHMIDT is Rhode Island State Commissioner of Education; HENRY J. NARDONE is a member of the Board of Regents, and Chairman of the Elementary and Secondary Education Sub-Committee of that body; The Honorable JULIUS C. MICHAELSON is Attorney General of Rhode Island; and DR. PETER FEUILLE is Assistnat Professor of Organization and Human Resources at the State University of New York at Buffalo.

In addition to the presentors who are represented in this publication, there were two panels of reactors to the presentations. Reactors included The Honorable ANTHONY M. FERRARO, Chairman of the House Committee on Health, Education, and Welfare; VINCENT J. PICCIRILLI, Esq. Attorney-at-law; ROBERT CASEY, representing the Rhode Island Federation of Teachers; PHILIP ABBATOMARCO, President of the Rhode Island Elementary School Principals Association; CAROL R. BROOKLYN, Cranston School Committee; DOMINIC F. CRESTO, Esq., Assistant Director of the Legislative Council; NATALE URSO, Esq., Attorney-at-law; JOHN F. DRURY, JR., Superintendent of Schools for Woonsocket; HENRY SHEPARD, President of the Rhode Island Association of Secondary School Principals; WILLIAM M. PEARSON, Chairman, Warwick School Committee; and SHERWIN J. KAPSTEIN, Executive Director of the Rhode Island Education Association.

Thanks are offered to all those who helped to plan and carry off the Conference on Teacher Negotiations and Impasse, and to those interested and dedicated persons who gave up a beautiful Saturday to attend.

Sidney P. Rollins
Rhode Island College

February 1976

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INTRODUCTION TO CONFERENCE

by

Crist H. Costa

We at Rhode Island College, specifically in the Department of Administration and Curriculum, want to welcome you to the Conference on Teacher Negotiations and Resolutions of Impasse. We hope that you find it an informative day. If an educator had fallen asleep about 25 years ago, and awakened sometime this November, and read the newspaper, he would have found story after story on legislative hearings on collective bargaining, and noticed that terms such as fact finding, compulsory binding arbitration, mandatory mediation, last best offer, and impasse resolutions are part of the educator's vocabulary. All of these terms might lead this educator to think that he had died, and been resurrected as a longshoreman or a teamster. None of us can afford to ignore the fact that we are now in a period in which schools are very much in the political spotlight. A continuing concern of educators is the makeup and interests of the various forces and groups shaping the conditions under which educators get to work with children. It is this department's concern for the job of schooling, and working with children, that precipitated the idea of the Conference.

Teacher negotiations is one of a number of political processes available to us to establish working conditions under which schools will function. This department believes that the college campus is probably the best and most appropriate forum for an exchange of ideas on these kinds of issues. This college is the kind of place where we can be free to speculate on the kinds of alternatives that are possible. We do not expect this Conference necessarily to provide clear answers to the problem. Rather, this is a place to discuss ideas. We have tried to bring speakers and reactors to this meeting to encourage your involvement in the consideration and discussion of the issues.

With these thoughts in mind I hope that you find this a productive expenditure of your time.

WELCOME TO CONFERENCE

by

Eleanor M. McMahon

The issue of impasse and collective bargaining negotiations in education is certainly one of current concern. Last evening's somewhat strident Journal Bulletin editorial noted that there are likely to be four major pieces of legislation dealing with this matter submitted to our House and Senate in the forthcoming session. I would suggest to you that it is particularly appropriate for us to be considering this matter in our bicentennial year. In my view, the genius of American society has been its capacity to work its way through diversity and to find consensus.

We need to resolve matters of impasse not only after they occur, but more importantly, to develop systems of law and of tradition which avoid impasse. That certainly is the tradition and the law of collective bargaining. Look for a moment at the National Labor Relations Act. A central purpose of that Act is "to provide means to avoid or substantially to reduce industrial strike, which interferes with the normal flow of commerce, and with the full production of goods and services for commerce." This law recognizes that when collective bargaining does not produce an agreement, the two sides may turn to traditional modes of labor/management warfare such as the strike and the walk-out. In the view of those who framed the act, while the strike is seen as a means of resolving an impasse, considerably more emphasis is placed on the threat of a strike as a means of avoiding impasse. The problem which brings us here today relates to the effectiveness of the threat of a strike in avoiding impasse--in bringing pressure for resolution to each situation.

If one reads the testimony given before the Board of Regents last year, one finds that the major argument used in favor of maintaining the present system was the fact of comparative peace, the relative absence of strikes, in preceding years. Now, in contrast, the major argument used in favor of change is the fact of numerous strikes this past fall. In other words, the problem is seen not so much as one in which the strike after impasse has failed, but as one in which the threat of strike has not succeeded in avoiding impasse. The question before us, then, is what is the most effective means of avoiding impasse? Is it the traditional labor-management model of collective bargaining and the right to strike? Is it the model used in much of the public sector, that of binding arbitration in all matters? Or is there some new model we might create, combining elements of those models, but adding special features of bargaining such as last best offer, or of strike, such as the graduated strike, which hasn't really been discussed much in Rhode Island, or of strike penalty, either such as Henry Nardone has suggested, or one of which I have recently read in which both

sides would pay a penalty by contributing for the duration of a strike to a community fund (a rather interesting idea). Is there then, some new model which will be effective in avoiding impasse?

This entire issue is in itself extremely complex--not in terms of the concepts involved (because those are fairly simple) but because it is at the nexus of intersecting interests in our society. There are at least six major constituent groups involved: the two teacher organizations, superintendents and administrators, school committees, the Board of Regents, and the citizens of our state. And there are at least five major issues. Should strikes be legal or illegal? Should we maintain at all costs the 180-day school year? Should we have binding arbitration on money matters? Should we employ the last-best-offer strategy? Should there be penalties on one side; on both sides; and in what form, after a strike occurs?

For the past few months, I have been keeping a box score on where the five major Rhode Island groups which have taken positions stand on each issue. This box score has not included the most important group, the citizens, because we do not know for sure where they stand--and they are unlikely to take a single position. On the question of the legality of the strike, the box score seems to be three-to-two in favor. On maintenance of the 180 days four-to-one in favor. On binding arbitration three-to-two. On last-best offer, one-to-four. And on penalties, a probable three-to-two. The scores themselves indicate a lack of consensus. But the picture of diversity is intensified when you look behind the scores. Superintendents say "no" on two of the issues on which school committees say "yes." The AFT and RIEA diverge on the central question of binding arbitration. In other words, even traditional coalitions are not in agreement on the major issues. (Of course, there is always the happy possibility that the position taken by the various groups represents a "first-worst offer".) The lack of consensus should not be cause for discouragement, but it certainly indicates that solution to the problem is in itself going to come only after extensive discussion, elucidation, and hard bargaining.

We turn today to the first two elements, discussion and elucidation, in the hope that these will facilitate bargaining and resolution. Only if we can avoid impasse in this forum, and in the legislative forum which will follow, will we be able to avoid or reduce impasse in the governance of our public schools.

THE COMMISSIONER SPEAKS

by

Thomas C. Schmidt

I think it is tremendous testimony to the importance of this issue and the depth of our feeling about it that we are here today despite our many and realistic mixed emotions about negotiations and impasse. We are in a situation today where perhaps the ideal solution would be that by good bargaining and good faith in negotiation, we might all find some way we could come before the general assembly and say, "education (remarkably) speaks with a single voice and this is what we offer to you as a potential solution to be adopted into law by that assembly."

I do not know whether that can be done. I think that it would be a significant sign to the people of Rhode Island if those who are concerned about education could find a way to work through their various differences and points-of-view to bring a concerted and coordinated leadership to the educational enterprise. That may really not be a very realistic wish on my part, because we are in a situation marked by self-interest from different points of view. These interests must be satisfied in one way or another, and to suggest that it might be simple or easy to bring about in a few short months is possibly unrealistic.

I do believe, however, that we have a goal and a responsibility to bend every effort to make that happen. I guess, though, with apologies to lawyers and judges, that I am not convinced that the law is everything in collective bargaining. It is terribly important, as important as the framework of this building, but it is not the whole building. It is not the whole process. Indeed, magnificent laws are often brought down to nothing by people who fall far short of magnificence; people who would find ways to bend that structure, ignore that structure, or live outside of that structure. So, perhaps the law we design is not as important as what we do with the structures that exist, or that we are able to bring into existance. I believe that for education in this next year what will be important is our ability to work together; the quality of our ability to take strong stands and to assume responsibility for our positions. Those elements which make bargaining in good faith possible include the attitudes, the willingness, and the emphasis that we have brought to it. I suspect that if we do not solve the problem; that is, if we allow the scattered remains of our self interest to be spread across the state of Rhode Island, there will be others outside the traditional power structure of education who will say that education is no longer a manageable enterprise. They will have very strong, very definite, and probably quite destructive opinions about what to do to us, for us, and for the children that they may feel we have neglected in the process.

THE "REGENT'S PLAN" AND OTHER IDEAS

by

Henry J. Nardone

In 1972, after nine school districts did not begin classes on the opening day of school, the then Commissioner of Education, Dr. Fred Burke, publicly expressed his dissatisfaction with the present bargaining system and pledged to seek an alternative which would result in more positive procedure for the resolution of impasse situations. The Department of Education prepared a draft of proposed changes that were designed to hasten the settlement of labor disputes. These recommendations were not limited to educational employees but extended to the whole class of public employees. The second draft of that original document and revised recommendations, applicable only to educational employees, were prepared and given a public hearing in April 1973. No action was taken by the 1973 legislature to alter the collective bargaining legislation.

In the fall of 1973 only three districts did not open on the normal school beginning, but these involved 40,000 students, or roughly twenty percent of the state's population of students. One of the first actions of the new Board of Regents was a directive to the Commissioner to review the procedure of collective bargaining and to propose recommendations for change. The resulting proposal was presented to the Board in December 1973 and public hearings were held on these recommendations in January 1974. After several workings copies, public hearings, board reviews and discussions, S2296 was introduced in the 1974 session of the legislature. This was the first Regents' proposal for the revision of collective bargaining legislation and provided for the following major changes: the right to refrain from teaching duties when there is no collective bargaining agreement, (that is the right to strike), the loss of salary for those days on which services were withheld, the ability to waive the 180 day requirement in the event of work stoppage, and the loss of state aid to school districts where a work stoppage occurred.

This bill was introduced by request of the administration and was accompanied by a message which noted the untenable situation with respect to teacher contract negotiations. The message concluded that we now face a situation where teachers can strike as a result of a dispute and be assured that they will not suffer any economic loss since all days must be made up during the vacation time. The Director of Administration, in testimony before the Senate Committee on Labor in April 1974, stated that the Regent's Plan as submitted had not generated the kind of broad support necessary for this bill to become law, and that this was of concern to the administration since some new solution must be in place before the following September school openings.

Discussions between the Governor and the Board of Regents (and we presume other groups) resulted in a substitute for S2296, which surfaced for the first

time the basic change to the so called Regents' Plan. In essence, this amended bill provided the option to the bargaining unit to select the "right to strike" or to submit the dispute to binding arbitration.

Again, to some extent due to relatively peaceful openings of school in September of 1973, when there were only three strikes, no action to change the legislation was taken during the 1974 session. The so-called Regents' Proposal was re-introduced by Senator Quattrocchi as S898 in the 1975 session without becoming law. This bill fleshed out some of the provisions of the previous year's bill and again provided for the limited right to strike enjoinable in the event of public emergency, penalties to both the teachers and the school committees, the option to select binding arbitration or the right to strike, mandatory mediation, waiver of the 180 day school year, and a rather detailed count-down procedure to insure settlement prior to the opening of school. The experience of nine years of operation under the Michaelson Act of 1966 culminated in the black days of September 1975, which saw fifteen public school systems and some 73,000 students affected by strikes. Teachers were being thrown in jail, bouquets and clubs were being dispensed by the courts, 788,000 students days were to be made up. Heroes and martyrs were made of those who openly defied the courts and the law.

The trauma and wounds caused to the public school systems, to the teachers, and to the children resulted in scars that are more than cosmetic. They are deep and tough, and they will not be easily disguised nor quickly forgotten. Whatever the reasons were for not being able to negotiate agreements last September - the staggering economy, the possibility of reduced state aid to education, cautious and frightened taxpayers, a genuine concern for job opportunities -- no matter what the reasons were, it must be evident that the primary objective of collective bargaining, which is to come to a negotiating agreement, was not working in Rhode Island school systems. Not one single group appearing before the Manning Commission has taken the position that all is well with 28-9-3 and that we should continue the <u>status quo</u>.

I think there are some fundamental principles on which all of us can agree. First, as a matter of public policy, the right to organize and bargain collectively is in the public interest. Second, we think that the best agreement is one arrived at by the parties concerned through the negotiation process. Third, when bargaining impasse is reached there must be positive methods of resolution. And, fourth, I think that we are all in agreement that something has to be done.

I want to review for a moment now some of the concepts that I feel are important, and which should be included in new legislation dealing with collective bargaining and impasse resolution. First, let me say, I do support the Regents' proposal S898 submitted in the January 1975 session. I would like to spend a moment presenting some amplifications and some variations on that general theme. I think the idea of selection of the "right to strike" or "last best offer" arbitration is unique. I do not think anyone has proposed or tried this scheme, and it certainly seems to provide all the elements of the value, strength, and power of the threat of

a strike. It combines many of the other desirable features that I will discuss shortly. We think that this proposal provides the best combination of high incentive motivation in negotiating with a powerful tool always at hand, represented by the possibility and threat of a work stoppage if impasse is reached. We think factfinding should be added to the proposal which now requires only mediation. Last best offer we think forces the parties to reduce their differences and to minimize them because the sudden death, or winner take all, aspects make it just too high a risk for either party to maintain and to hold on to an exaggerated position. Total package selection versus individual items we feel also puts pressure on both parties to be very careful on each item in the package. Slipping in one "zinger" may cost the whole ball game. We think the law should contain some specific selection criteria. Both parties should know what these criteria are. The arbitrator must select the most reasonable offer based on specific criteria, such as the ability to pay, representative settlements in comparable situations in public and private sectors, and state-wide and area-wide market comparisons.

The entire process of negotiation, mediation, fact finding, and arbitration should be on a time table that will insure the consummation of an agreement prior to the scheduled school opening. Both parties should be permitted to continue negotiating after a last best offer has been made up to the time of the arbitration award. Failure to comply with the arbitrator's award should result in fines and/or imprisonment on either party equally. If the option to select the strike is exercised, I think teachers should lose one 365th of their annual salary for each day on strike. Now the 1/365th is more of a concept than a number. The point I am trying to make here is that the teachers are on an annual contract and it ought to be recognized as such. If the number ends up being 250 or some other number representative of the normal number of working days, or the normal number of available days, it does not bother me at all. I think the principle is that it is an annual contract and there should be equal "benefit" to the strike on both sides in terms of the economic impact and the economic cost. It also provides a way for the school system to provide the 180 days of school for the students.

I think one of the tough decisions with respect to what should happen in collective bargaining revolves around the waiver of 180 days. There are many people who consider that the make up of five days or ten days is not very effective, and therefore there is no problem in just eliminating those days from the school calendar. I think, however, that when we get to the point where the strike lasts twenty or thirty days it is a real tough problem. It is impractical to say that the school year is now going to consist of 140 days or 130 days or 150 days. So I think there should be powerful motivation to maintain the 180 days of school. The law, I think, should also provide that a strike may be enjoined in the event a public emergency is determined by the courts.

There are obviously many forms or variations that last best offer/binding arbitration can take. I think that this is one of the strengths-that it can be molded and changed. The dimensions and contours can be made to fit the priorities of a particular situation or a particular state. Obviously the total package selection versus individual item selection is one of the

variations. Single offer versus dual offer, binding arbitration on all items, binding arbitration just on salary items, selection criteria, specific or general pre-arbitration procedures; the possibilities are almost limitless, and as I said before, the strength in such a last best offer-binding arbitration procedure is that it can be shaped and be molded to suit our particular needs. It can be defined to achieve those priorities that we establish for ourselves. However, I think that the final and overriding consideration should be the selection of those variables in last best offer/binding arbitration which have the greatest potential to cause both parties to arrive at their own agreement through negotiations.

"THE MICHAELSON ACT"

by

Julius C. Michaelson

We are today discussing the law dealing with teacher negotiation. It is just 10 years after it has been in effect. A lot of things have happened in that time. One of the more important things that happened is that teachers have united, and the competing American Federation of Teachers, and Rhode Island Education Association no longer have conflicting philosophies about how to resolve educational problems. No longer is one group militant and the other group not militant. Both groups are militant, both groups want to assert their rights, and both groups have the same goals.

Now school committees find that a device which had been attractive and a device which had been successful ten years ago no longer works, because the technique of divide and conquer no longer applies. In 1966 the reason a legislative commission was appointed to study the whole problem of collective bargaining for teachers was that the school committee in the City of Pawtucket was unwilling to give tenure to married female teachers. The rationale included these arguments: first, a woman can become pregnant; second, an unmarried woman can marry, and then loyalty might be not to a job but to a family and/or a husband. For some reason or other, it was believed that it would not be good to offer tenure and protection to married female teachers who might be leaving their jobs to have children.

Pawtucket teachers had a long and bitter strike around 1964; one which lasted for more than 10 days. The issue was not "dollars and cents", but whether or not married women teachers should have tenure. The Governor of the State of Rhode Island, John Chaffee, appointed a representative group of Rhode Island citizens whose responsibility it was to study the causes and effects of that strike, and to make recommendations to the teacher organization and to the school committee for resolving the controversy. Unanimously, the committee recommended that married women teachers should be treated the same as any other teachers. The Pawtucket School Committee rejected the recommendation. It took an act of the General Assembly amending the tenure law to settle that strike. The legislature, in effect, interfered and sided with the teachers.

The General Assembly determined that it would not permit a similar situation to occur again. In 1964, although the Pawtucket teachers were organized, they had no legal rights. The Pawtucket School Committee

could negotiate with them if the Pawtucket School Committee so desired. On the other hand, since there was no law on the books, the Pawtucket School Committee was not required to negotiate.

When a Commission was appointed, the first thing that it decided was to give legal rights and make first class citizens out of teachers by giving them the right to join unions or professional associations and organizations, and to bargain collectively. School Committees would be required to bargain in good faith. And a whole series of provisions were put into the law culminating with binding arbitration on matters which did not involve the expenditure of money and providing for advisory arbitration on matters which did involve the expenditure of money. The reason that advisory arbitration was provided on matters which involved the spending of money was that the law was unclear at that time. It was not known whether an arbitrator would have the power to determine a teacher's salary. The Study Commission felt that if one went to a professional third person, with no interest whatsoever in the outcome of an arbitration case, his decision would have a strong moral and psychological impact on both a school committee and a teachers' organization.

In any event, about three years after the passage of the act it became evident to the Rhode Island General Assembly that there had to be a better way of resolving impasses which occur between school committees and teacher organizations. A second study commission was appointed, and I was named chairman. That Study Commission was concerned with the problem of resolving impasses. It was evident even then that school committees for the most part would not accept the advisory arbitration judgements of neutral third parties. Some of the members of that Study Commission recommended that teachers should have the right to strike. A majority recommended binding arbitration for money matters, and also recommended that school administrators have the same rights as school teachers.

Legislation was introduced to accomplish both recommendations, but it was not passed. It did not pass because when it was finally presented to the General Assembly it was opposed by both teacher organizations and by school committees. Between 1969 and today the Michaelson Act, which was unpopular with school committees and school administrators, has suddenly become a fine piece of legislation for those who want no change. Whenever proposals are made in the General Assembly either to give teachers the right to strike or to provide for binding arbitration, someone (most recently school committees) will come along and suggest that the Michaelson Act itself is not so bad, that it is working. "There were some strikes," they will say, "but as a general proposition, it's working and it's working pretty well. So, let's tighten up the Act by changing time periods and by requiring that results must be reached within so many days before school opens."

These are really meaningless suggestions. What happens if those results are not reached within prescribed time periods?

In any event, the law has now been on the books for 10 years. Some of the early problems connected with the law, namely the question of

whether an arbitrator has the right to determine what a teacher's salary will be, have been resolved by the courts. The courts have ruled that it is not an invalid delegation of power to permit an arbitrator to fix salaries.

We have had experience with binding arbitration on money matters with policemen and firemen, and it works and works well. We are confronted with a problem that included two bad strikes last year. Again we are asking what we can do to make sure that we will not have more strikes in the future. Well, I would submit that there is nothing that we can do to prevent strikes totally. There is no way to fashion a law which will guarantee that people will not discontinue rendering services to their community if they feel that the conditions under which they are required to render those services are not only unsatisfactory but intolerable. There are ways to reduce the opportunities and the possibilities of strike, and I think that is really why we are here.

When we talk about impasse resolution, it seems to me that we first have to analyze how an impasse occurs. If the impasse can be prevented in the first place, we won't have to worry about how to resolve it after it occurs. I want to say that one of the underlying reasons for the enactment of the Michaelson Act in 1966, at least as far as the members of that bi-partisan commission were concerned, was to create a kind of a partnership between school teachers and school committees in the operation of the public school system. School committees never really had the opportunity, or were willing to take the opportunity prior to 1966, to sit down on any kind of a protracted basis with the representatives of teacher organizations to discuss their problems. And teachers did not always recognize what the problems of school committees were. There was no arena for exchanging, on a face to face basis, the attitudes and information possessed by both parties. The Commission felt that by requiring the parties to sit down together avenues of communication would open a partnership which would result in educational progress.

I participated in many of those early negotiation sessions; and frankly, I was amazed at how little some members of school committees knew about the problems that teachers were encountering in class rooms, and at how little teachers understand the kind of budgetary restraints on school committees. I was heartened by the fact that during some of those early negotiations there was an effort on the part of both parties to pursue a common goal to improve education for everybody.

Of course, once money is involved problems develop. A school committee and a teacher organization might agree that the optimum size of a class should be 25, but a school committee might say to a teacher organization, "we can't afford to reduce that class to 25." Various discussions of alternatives then take place. We hoped a sophistication between school committees and teacher organizations about the bargaining process would develop as well as a partnership. Unfortunately, an adversary kind of a proceeding developed.

I think that the proposals which have been made by the Board of Regents and various other parties with reference to the resolution to impasse between school committees and teacher organizations concentrate on the adversary nature of the proceedings, and are not in the best interest of the people of the state of Rhode Island.

There are several simple solutions that must have occurred to many as ways of at least helping to prevent impasse from occurring in the first place. One solution I think the Board of Regents should consider is to create a kind of instructional program on collective bargaining which runs on a full time basis. Judging from the calls I get in my office as Attorney General from members of school committees and from teacher organizations about what the law says and what the law means, I know that sophisticated knowledge about the operation of collective bargaining has not permeated the educational community. I think that such a program, not of an academic, theoretical nature, but of a practical nature explaining the law about the bargaining process in simple terms should be available. Sometimes strikes occur because one person says the wrong thing to another person. A program that permits interested parties to learn about negotiations is what is needed in collective bargaining. This is particularly true among school committees because school committees are part-time people. They work long hours for little pay.

I do not think that school committee people really understand and have had the time to apply themselves to the concept of collective bargaining. It is something that they frequently delegate to somebody else, and there is not always the best communciation between the individual to whom that responsibility is delegated and the school committee. Sometimes the school committee is interposed between itself and the mayor, or whoever it is who appropriates money in a particular community. If the school committee wants to appropriate more money and the mayor does not that creates a problem. If the mayor wants to appropriate more money and the school committee does not, that creates a problem. I think that all of these things are matters which, on a continuing basis, should be part of an instructional process. I also think that the Board of Regents should have a central repository of all collective bargaining information available in the state of Rhode Island.

The teacher organizations already do a good job with this. The Rhode Island Education Association and the American Federation of Teachers generally know what is happening throughout the state of Rhode Island. A central repository of records, although it is not going to solve impasses, would be helpful as a relatively simple solution that does not require legislative enactment.

But when all is said and done, when teachers and school committees reach an impasse, there are only two alternatives. One is the right to strike. The other is binding arbitration. I want to explore these two possibilities with you, give you my own views about them, and why I think one is preferable to the other.

The Rhode Island Education Association conducted a study that indicates that since 1966, in about 74% of the cases, school committees and teachers organizations have negotiated contracts on all matters. We hear much about the strikes, but in ten years contracts were signed without arbitration and without strikes in 74% of the cases. In about 20% of the cases, unresolved issues were submitted to arbitration and in many of those cases, both parties accepted in full the arbitrator's award. The awards of arbitrators, in my view, have been reasonable with very few exceptions. Awards of arbitrators have never really threatened any community with serious or even minimal financial problems. This year, which was perhaps the worst in Rhode Island's history with reference to work stoppages, arbitrators' awards were invariably modest. They were considerably less than the increase in the cost of living, varying from 5% to 7% on an average. Teachers usually were willing to take those awards but school committees were unwilling to pay them. There was at least one exception. In Cranston, the teacher organization, for special reasons, would not accept the arbitrator's award even though the school committee was willing to go along with it.

The Rhode Island Education Association study leads to the conclusion that arbitrators' awards, as a practical proposition, have been binding anyway, because they have been accepted in almost every case. When a strike did occur because one of the parties would not accept the arbitrator's award, the contract which the teachers and school committee ultimately signed was generally the same as the arbitrators' award anyway. Even in the bitter strikes which occurred this year the differences between the final settlements and the decisions of the arbitrators were minimal. Another interesting point is that where there have been strikes, those strikes have invariably been to enforce the arbitrators awards. The teacher organization that struck insisted that a neutral third party had made an award. The strike was to enforce that award. As a matter of fact, when strikes have been settled, they have always been settled through the interposition of an arbitrator. In these recent bitter strikes in Pawtucket and Woonsocket, the purpose was to enforce the award of the arbitrator. Those strikes were settled by an arbitrator. In one case the arbitrator who helped settle the strike was Judge Weisberger, and in the other case the arbitrator was Governor Noel.

So the purpose of strikes has been to enforce an arbitrators award, and the settlement of the strikes has been through an arbitrator. Now as a practical proposition, if teachers had the right to strike (based on experience not only in the public sector, but also in the private sector), strikes would in most cases actually be settled by a third party.

If the legislature passed an act which said that teachers have the right to strike (there are some who feel that strikes would be reduced if a school committee knows that the teachers have a right to strike) the threat of the strike would be very important in reaching an agreement without a strike. As a result, teachers and school committees would be more inclined to reach an agreement.

Some people have the mistaken notion that a strike is something which teachers embark upon as a lark; that it is a happy, pleasant experience. On the contrary, it is a very serious and important decision. It is not anything that anyone wants to do, whether it is in the public sector or the private sector. As far as teachers are concerned they feel if it can possibly be avoided, it should be avoided. That is also true as far as school committees are concerned. Some people feel that school committees encourage the teachers to strike. I do not think that school committees wittingly do that. But the point is that people who argue in favor of the right to strike say that if both parties know that there is a legal right to strike, there is a better chance that there will not be one, because no one really wants to strike. This is not an argument that especially appeals to me, but it is an argument which can be advanced with some statistical data to support it. However, when a strike finally occurs, it is generally some third party, a factfinder, a mediator, a judge, a person in public life, who ends up resolving it. So why wait until a strike occurs to have a third party come in to resolve it?

I think that the real issue is the right to strike. That issue is complicated by saying that those who strike should be punished. I think you create a situation in which the employer is saying to teachers "we are going to punish you; we are going to put you in jail if you assert your rights; if you refuse to work under situations which you consider intolerable." I do not think that is a reasonable way to approach the solution of an educational problem. I do not think that punishment solves that kind of a problem. Punishment does not even work at the ACI. It surely is not going to work with teachers. Some say that we can equalize the punishment, because the school committee can be punished also. How is the school committee going to be punished? Some say they will lose state aid. State aid represents roughly thirty percent of the cost of operating public schools. What about the other seventy percent? I do not think one can possibly equalize in any way the punishment between teacher organizations and school committees.

Another element has been introduced into the debate; that is, this concept of the last best offer. I think that last best offer is a bargaining monstrosity. It is the most complicated thing that I have ever encountered. I think that it will only result in utter and total confusion and turn collective bargaining back to the 19th century.

Let us analyze the concept of last best offer. There are two kinds of last best offer programs. One deals with each item in the contract. The other deals with the contract as a whole. When a school committee and a teachers' organization are involved and each is at the point of maneuvering, which last best offer is considered? The last best offer for the teachers? The last best offer for the taxpayers? Or the last best offer for the students who attend the classes. It is not possible in last best offer negotiations to have a last best offer for the students or for the community in which the schools are located. It is not possible because what the arbitrator is concerned with is the last best financial offer.

If the last best offer were on an individual, item by item case in the contract, the situation would be virtually impossible. Using teacher salaries as an example there might be a last best offer for bachelors + 30 degrees, a last best offer for a master's degree, and a last best offer for a doctorate. There might be a last best offer on whether or not the size of the class room should be 25 or 75 (when in fact the size of the class perhaps really ought to be 30) and the arbitrator would have no choice. There might be a last best offer on the number of preparation periods, on the kind of blue cross coverage, on the kind of grievance procedures, on posting of promotions, on transfers and seniority--you name it.

If last best offer does not work on an item by item basis will it work on a whole contract? Let us analyze that. It seems to me that a battery of certified accountants would be needed to determine what the cost of the ultimate last best offer was. Suppose, for example, teachers were modest with reference to what they were seeking for salary by steps, but were not modest with what they were seeking in fringe benefits. What an arbitrator would have to do based on the concept of last best offer, would be to try to figure out in dollars and cents what the school committee offer would cost the taxpayers, and then decide which award would be made. Undoubtly, this would end up in the courts.

When all is said and done, it seems to me the best way to handle this kind of a problem is to handle it in a simple, understandable way. We have ten years of experience. We have begun to develop some understanding, some comprehension, some sophistication about negotiations. As I said earlier, you either provide for the right to strike or you provide for binding arbitration. In my view, binding arbitration is more preferable. It's more preferable because, as I pointed out, if a strike occurs regardless of what kind of a law exists, an arbitrator probably is going to settle the strike after it happens.

Binding arbitration has many advantages. Once a strike occurs there is no question that a kind of bitterness, a kind of resentment develops in the community. Animosities between teachers and school committees are not easily removed, and many years can pass before the involved parties can forget their resentments and participate jointly in some kind of solution. Secondly, an arbitrator introduces a neutral third party into a controversy which perhaps has become very heated. A neutral third party, an arbitrator, can decide between the competing claims of the parties. The history in Rhode Island has indicated that the awards have generally been modest and consistent from community to community.

Through binding arbitration teachers do give something up; they give up what they claim to be a right. School committees also give something up; they give up their power to determine what teachers are going to be paid. But binding arbitration is only going to occur in a small number of cases, because neither teacher organizations nor school committees want the matter resolved by a third party. In most cases problems will be resolved internally. If there is not a resolution of an impasse

because the parties directly concerned are unable to reach an agreement, it seems to me that resolution in the educational field should come about peacefully and orderly through binding arbitration while classes continue, rather than through a strike with all of the antagonism and animosity that is aroused in the community.

When I was on the Rhode Island Impasse Resolution Commission in 1969, I reached that same conclusion. So did the majority of the Commission at that time. Nothing has happened to change my mind. I would say, however, that if we get involved in binding arbitration we must provide the same rights for non-teaching personnel. If the goal is a continuing, uninterrupted educational process, one cannot have school clerks and school janitors on a picket line and school teachers refusing to cross that picket line. In addition, it seems to me that if those rights are given to teachers in the public school system of a city or town, then those same rights should be given to teachers who work for the state of Rhode Island. I think that we will find if we do not try to over complicate this problem with overly sophisticated solutions which are only going to require complicated negotiations and court interpretation and modify a law with which we have become familiar, perhaps we will have taken an important step in our state to provide an educational climate which, in the final anaylsis, will be for the benefit of our children.

TEACHER NEGOTIATION IMPASSE RESOLUTION ALTERNATIVES

by

Peter Feuille

I plan to discuss a variety of negotiation impasse resolution alternatives which have been used in other jurisdictions. I have my own preferences among these alternatives, but they are much less important than your recognition that there are a variety of mechanisms by which negotiating table impasses can be carried to a conclusion, and to the best of my knowledge nobody has presented a convincing case for "one best way" to achieve this result.

Taylor Law Experiences

We can begin by looking at some of the experiences that have occurred under New York's Taylor Law. Passed in 1967 and applicable to all state and local government employees in New York, during its first seven years it had the same impasse procedure for everybody: mediation, then factfinding, with a "legislative hearing" as the final step if the impasse continued beyond factfinding. The legislative hearing was just that -- a hearing conducted by the appropriate legislative body at which the parties involved explained their positions and after which the legislative body was empowered to "take such action as it deems to be in the public interest." However, most negotiations were concluded without the need for such a hearing.

For the years 1972, 1973, and 1974, about 70 percent of the negotiations around the state were settled without third party assistance (though I suspect that figure has decreased this year). However, of the 30 percent of the cases in which third parties became involved, about two-thirds were in school districts and the vast majority of these involved teachers. In New York, then, teachers have used the available impasse resolution procedures proportionally more than other public employees. Why this is so is an interesting matter for investigation.

In 1974 the legal picture changed. The Taylor Law was amended to provide for three separate dispute resolution processes. Police and fire were given compulsory conventional arbitration. In school districts the legislative hearing was abolished, meaning that the board of education -- the counterpart to your school committee -- could no longer play the role of employer and impasse resolver simultaneously. In place of the legislative hearing, the state Public Employment Relations Board (PERB) was empowered to provide post-factfinding assistance if the factfinder's report did not produce a settlement. In effect, school districts and teachers now have access to a three step impasse process: mediation,

factfinding, and counciliation (or supermediation). For all other state and local government employees, the impasse procedure continues to consist of mediation, factfinding, and the legislative hearing (and this last step is not used very often).

It is difficult to offer accurate generalizations about the impasse experiences around the state. The police-fire arbitration procedure is relatively new and hence difficult to evaluate (though in the state's larger cities it is being heavily used). The changing environmental pressures -- increased public employee unemployment, taxpayer resistance, the poor fiscal condition of the state and many cities -- mean that negotiation and impasse outcomes may change over time irrespective of changes in the Taylor Law. However, we can say that the majority of negotiations result in an agreement without third party involvement, but the teachers seem to be the chief exception to this conclusion. Teacher negotiations in New York seem to attract mediators, factfinders, and conciliators in the same manner that the Democratic presidential nomination attracts politicians who are breathing and not under indictment. The vast majority of teacher negotiations result in an agreement during negotiations, mediation, or factfinding, but some sticky cases get to the counciliation or supermediation state. In addition, every year there are some teacher strikes, and this fall "some" became "many" -- 17 at last count, including New York City -- as the teachers pressed for increased job security in the face of mounting teacher unemployment and the school boards searched for cost savings in the face of increasing public resistance to higher taxes. Most of these strike cases also received a heavy dose of conciliation.

Strikes frequently are overlooked as an impasse resolution process in government due to the widespread conventional wisdom that public employees should not strike. Although a few states are experimenting with the legal right to strike for public employees, New York is not one of them. The Taylor Law prohibits strikes and provides some teeth to make that prohibition meaningful. Specifically, the law requires that the employer withhold from each striker two days pay for each day on strike, and the PERB is authorized to suspend the union's dues checkoff privileges for a specified period of time. To give you an idea of what these penalties can mean in practice, consider the situation that occurred in the Buffalo suburb of Orchard Park earlier this fall. The teachers struck for 19 working days, which means that each striker lost 38 days pay -- which at a daily rate in excess of $60 means that the average teacher lost about $2400 during the strike. In addition, the PERB ordered the local teachers' union dues checkoff privileges suspended for several months. Finally, because the strike continued in defiance of an injunction against it, the judge who issued the injunction slapped contempt of court fines in excess of $5,000 on the local union, ordered the teachers' negotiating team to jail for 30 days, and fined the negotiators $250 each. These contempt of court penalties are being appealed. While the Orchard Park case is not typical, either in terms of the length of the strike or the penalties levied, it does give you some idea

of how costly it can be to conduct a teacher strike in New York.

Some of you may believe that public employee strikes should be legal, while many -- and perhaps most -- of you believe that they ought to continue to be outlawed. We are not concerned here with the answer to this right-to-strike debate. The important point to note is that if the state's ultimate political authority -- the legislature -- decides that government employee strikes should be illegal, then the logical conclusion of that decision is to couple that prohibition with some penalties which are stiff enough to cause some pain when they are applied. New York has done that, and there is no doubt in my mind that while the strike prohibition and penalties have not prevented all strikes, they have prevented a number of strikes which otherwise would have occurred (though it is obviously impossible to tell how many). The key operational issue that is relevant here is to consider what kind of impact the strike penalties have on the employer's incentives to negotiate in good faith. In New York the two-for-one financial penalties are collected by the struck employer. As many teachers are fond of pointing out, this fact means that school districts may financially profit from a strike, and they suggest that this reduces the employer's incentives to negotiate in good faith. While it is true that New York school districts can emerge from a teacher strike in good financial shape, this line of reasoning suggests that the employer's primary motivation is saving money rather than providing educational services. I have never seen any proof of this.

In sum, the Taylor Law prohibits and penalizes strikes, and this undoubtedly has resulted in fewer strikes around the state than otherwise would be the case. Perhaps more important, the state PERB provides a substantial amount of nonbinding third party impasse resolution assistance in the form of mediation, factfinding, and conciliation -- all of which is free to the parties -- and the bulk of this assistance goes to teacher negotiations. If you believe that unions and managements ought to reach their own agreements without any outside help, you probably would conclude that New York school boards and teacher union locals are suffering from a bad case of third party dependency. However, if you believe that the name of the game is peaceful settlement by whatever means possible, I suspect you would find these developments to be salutary.

Compulsory Interest Arbitration

This last point -- settlement by whatever means possible -- gets us into the arena of interest arbitration. In the past several years legislatures in several states, including New York and Rhode Island, decided that bargaining impasses involving police and fire employees -- who arguably provide local government's most essential services -- ought not to include the possibility of a resolution via a strike. As a result, these legislatures have passed compulsory arbitration statutes which are designed to simultaneously provide for a binding resolution of any impasses and increase the unions' bargaining power.

We can separate compulsory interest arbitration into two categories: conventional and final offer. Conventional arbitration -- the most common kind -- involves the mandatory submission of a bargaining impasse to the arbitrator who then fashions the award he deems proper on the issues in dispute. While there are a variety of criticisms which have been aimed at conventional arbitration, for our purposes the key one involves the alleged deterrent or "chilling" effect that conventional arbitration has on the parties' incentives to bargain in good faith. If either party, the argument goes, anticipates that it will get more from the arbitrator than from a negotiated settlement, it will have an incentive to avoid the trade-offs of good faith bargaining and cling to unrealistic or excessive positions in the hope of tilting the arbitration outcome in its favor. This lack of hard bargaining will occur because of a significant reduction in the costs of disagreement. There won't be any strike costs, and the compromise nature of the typical award -- more than the employer has offered and less than the union has asked for -- reduces the uncertainties associated with continued disagreement. In other words, since conventional arbitration involves much smaller costs of disagreement than strikes, there is much less incentive to avoid it.

Final offer arbitration has been touted as an antidote to the alleged chilling effect of conventional arbitration. Under conventional arbitration the costs of disagreement are rather small; in contrast, final offer arbitration attempts to increase the costs of disagreement by eliminating the arbitrator's ability to compromise between the final positions of the parties. Since the arbitrator must select one or the other final offer, the parties should be induced to develop ever more reasonable positions in the hope of winning the award, and these mutual attempts to win neutral approval should result in the parties being so close together they will create their own settlement. These convergent movements should result because of the fear that the arbitrator will select the other side's offer. In other words, the possibility that either party may lose "the whole ballgame" in arbitration will act as an incentive for them to seek security in their own agreement. As a result, final offer arbitration should not have a chilling effect because the potentially severe costs of disagreement will enable it to function as a "strikelike" mechanism in a manner that conventional arbitration does not. Finally, even if an award is necessary, the procedure should have pushed the parties so close together that, whatever the arbitrator's choice, the award would be reasonable.

Since numerous jurisdictions have established and used conventional and final offer procedures in recent years, we can compare the experiences under them to see how they have operated. First, conventional arbitration does not chill the incentive to bargain to such an extent that it has the much-feared "narcotic effect" of turning negotiators into arbitration addicts who habitually rely upon arbitrators to resolve their impasses. In the several public jurisdictions in the U.S. and Canada that I have studied (which does not include Rhode Island) the majority of negotiations which have taken place under the aegis of an arbitration

statute have resulted in negotiated settlements. However, there are some jurisdictions -- Pennsylvania is a good example -- with much higher rates of conventional arbitration dependency than exist in other jurisdictions.

Second, while final offer arbitration is not the perfect dispute resolution procedure that my earlier remarks may have implied, the available evidence clearly shows that final offer arbitration has less of a chilling effect on negotiations than does conventional arbitration. I reached this conclusion by comparing the proportion of all negotiations which result in arbitration awards in a sample of conventional and final offer jurisdictions. The data showed smaller award rates in the final offer jurisdictions than in the conventional jurisdictions, which is the same thing as saying that there was a larger proportion of negotiated settlements in the final offer jurisdictions. This result is consistent with the theoretical claims made for final offer arbitration. As a result, I conclude that final offer arbitration is the superior procedure, and I reach this conclusion because of my strong preference for negotiated agreements rather than imposed awards. However, if you are indifferent between negotiated and imposed outcomes, there is no reason for you to prefer the final offer process.

Up to this point one implication of my remarks has been that final offer arbitration is a monolithic process which everywhere operates in the same manner. Nothing could be further from the truth, for final offer procedures can be constructed in a variety of forms, and I want to discuss a few of the more important structural components. I am told that final offer legislation may be introduced in the forthcoming legislative session, and if so the drafters of such legislation will need to pay careful attention to the kind of procedure they are creating (and what procedural trade-offs they will be willing to make during the lobbying process).

The most basic decisions involve which employee groups the procedure will cover and the scope of the process (i.e., what is arbitrable). These are political decisions in the best sense of that term and there is little I can say that will enlighten you on these matters. However, there are several crucial structural decisions which must be thought out when drafting the shape of any final offer process. The first and most important is the nature of the selection decision. There are two possibilities; package selection, in which the arbitrator must select one or the other party's final offer on the entire package of disputed issues, and issue selection, in which the arbitrator selects one or the other party's offer separately on each issue in dispute. Obviously, package selection yields an "all or nothing" outcome and does not allow the arbitrator any flexibility in balancing the parties' positions; in contrast, issue selection gives the arbitrator some flexibility in handling multi-issue disputes but reduces the parties' incentives to reach agreement on the entire package of bargainable issues. I urge you in the strongest possible terms to choose the package selection option. I believe package selection to be the very core of the final offer concept; I find the arbitrator's compromise ability under issue selection to be repugnant to the final offer concept. The name of the final offer game is risk: it is supposed to be risky for the parties to go to arbitration because of the possibility that one party will lose. Issue selection significantly reduces the degree of risk attached to not reaching agreement,

and the Michigan experience with issue selection suggests that the parties leave many issues on the arbitration table that would not be there under package selection. Further, other experiences in Wisconsin and Eugene, Oregon suggest that with package selection each party must carefully consider its position on each issue or run the risk of losing the selection decision solely because of the inclusion of one objectionable item. Since no negotiated settlement ensues unless there is agreement on all items, this is additional evidence of the larger negotiation incentives with package selection compared to issue selection.

Next, you need to consider what kind of pre-arbitration impasse procedures will be available and/or required. It will make a difference if the parties must first go to mediation and then factfinding before arbitration compared to a situation where they go directly from negotiation to arbitration. A certain percentage of disputes should be settled at the pre-arbitration steps. Perhaps more important, if factfinding is required and the fact-finder's report is one of the arbitrator's selection criteria -- as it is in Massachusetts -- you may end up with an impasse procedure where fact-finding is the key step. In Massachusetts, it appears as if the final offer arbitrators are selecting whichever party's final offer comes closest to the factfinder's recommendations. The Iowa procedure goes even further and allows the arbitrator to select the factfinder's report as the final offer to be implemented.

Another important structural component is the form of the arbitral intervention. Again, there are two choices: the single arbitrator, and the tripartite panel of one adversary representative from each side and a neutral chairman. The experience from various final offer jurisdictions suggests that the tripartite panel can be a useful vehicle for informal communication between the chairman and the contending parties which often can be instrumental in bringing about a negotiated settlement during the arbitration process. A related set of components that must be considered includes whether or not the arbitrator shall have the authority to mediate and the authority to remand the dispute back to the parties for additional negotiations. I think the answer should be "yes" on both counts because these mechanisms can aid in producing negotiated settlements during the arbitration process.

Finally, there is the question of the final final offer submission deadline: what and when will be the last point at which the parties can submit their final offers or amend previously submitted offers? Some statutes give the arbitrator the right to establish that deadline; other statutes specify when the deadline shall be, but vary substantially in the precision of their language. An early deadline say, several days before the arbitration hearing, forces the parties to make their hard choices in an atmosphere of considerable uncertainty; a late deadline gives them a chance to hold back until they see how the other side and the arbitrator are leaning.

There are a variety of other structural items -- choosing an arbitrator, paying the costs, establishing selection criteria, and so on -- that also

need to be considered. While I obviously have my preferences among all these items, the most important lesson from these remarks is that you not fall into the trap of believing that there is any such animal as THE final offer arbitration procedure. Instead, final offer procedures can be and have been constructed in a variety of forms, and if you are seriously considering final offer arbitration for Rhode Island I urge you to examine the procedures which exist elsewhere in order to become aware of some of the possibilities. I hope that if final offer arbitration is adopted in this state it will be a procedure which places a high premium on the incentive to bargain.

Conclusion

So far I have discussed most of the available impasse resolution procedures without explicitly discussing my preferences among them. I find conceptually attractive the right to strike for all public employees except police officers and fire fighters. I am attracted to the right to strike because it makes the collective bargaining process more meaningful than any of the procedures discussed earlier by imposing some potentially severe costs on both sides. Perhaps most important, it gives management the opportunity to show some strength by taking a strike -- an opportunity which does not exist under arbitration. However, given the conventional political wisdom that public employee strikes are intolerable I realize that this alternative does not have much chance of being implemented. Since I have a strong preference for negotiated agreements, I like those procedures which reduce the dependency of unions and managements upon third parties. If arbitration is deemed politically necessary, I strongly favor final offer arbitration with package selection because it is the impasse procedure which seems to do the best job of preserving the parties' incentives to reach their own agreement.

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